AUG 20 1953
HAROLD B. WILLEY, C

No. 280

308 US
Sup. Ct.

Supreme Court of the United States

OCTOBER TERM, 1953

PHILLIPS PETROLEUM COMPANY, *Petitioner,*

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, CITY OF DETROIT, MICHIGAN, CITY OF KANSAS CITY, MISSOURI, CITY OF MILWAUKEE, a municipal corporation, COUNTY OF WAYNE, MICHIGAN, and THE FEDERAL POWER COMMISSION, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Phillips Petroleum Company prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which reversed an order of the Federal Power Commission holding that Phillips Petroleum Company is not a natural gas company within the meaning of Sections 1(b) and 2(6) of the Natural Gas Act.

OPINION BELOW

The opinion of the Court of Appeals (R. 1855-1873) is not yet reported. The findings and opinion of the Federal Power Commission appear in the record at pp. 1682-1753.

JURISDICTION

The judgment of the Court of Appeals was entered May 22, 1953 (R. 1875). The jurisdiction of this Court is invoked under 15 U.S.C., Section 717r(b) and 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Petitioner gathers natural gas, which it produces in part and buys in part from others, by networks of pipe lines located in the producing field. The gas moves from the wells through these pipe lines to a plant or plants located in the field where gas from different lines serving different parts of the field is commingled; as the gas moves through the plant liquid hydrocarbons and impurities are removed. A part of the residue gas is used or sold locally, and the remainder is delivered at outlets of the plants to pipe line companies which transport it interstate and resell the gas for use in consumer markets. Phillips is not a natural gas company within the meaning of Sections 1(b) and 2(6) of the Natural Gas Act unless these sales to pipe line companies make it one, and Phillips is not affiliated with any company that is a natural gas company.

The Federal Power Commission found (1) that petitioner's sales are a part of, or an incident of, or an activity related to production and gathering, and for that reason are not subject to regulation under the Natural Gas Act, and (2) that the sales are made during the course of production and gathering and are so closely connected with local incidents of that process as to make federal rate regulation inconsistent with or a substantial interference with the exercise by the affected states of their regulatory functions, and for this additional reason are not subject to regulation under the Natural Gas Act.

The question presented is whether the Court of Appeals erred in holding that the Federal Power Commission's determination was wrong as a matter of law.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, ch. 556, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*) are set forth in the appendix.

STATEMENT

The Proceedings Before the Federal Power Commission

By an order dated October 28, 1948 the Federal Power Commission, on its own motion, instituted an investigation to determine (1) whether Phillips was a natural gas company within the meaning of the Natural Gas Act and if so, (2) whether any of its rates were unjust or unreasonable (R. 1647-1660). Upon motion by Phillips, the Commission ordered the scope of the investigation limited to the first question (R. 118-119, 1662-1680).

The State of Wisconsin and its Public Service Commission, The City of Kansas City, Missouri, The City of Milwaukee, The City of Detroit, Michigan, The County of Wayne, Michigan, and the Michigan Public Service Commission intervened in the proceeding, contending that Phillips was a natural gas company and that its sales should be regulated by the Federal Power Commission (R. 5-6, 1687). The producing states of New Mexico, Oklahoma, and Texas intervened, contending that Phillips' sales were not subject to regulation under the Natural Gas Act because regulation of those sales by the Federal Power Commission would interfere with the exercise of the regulatory functions of the states (R. 80-83, 87-93, 100-103). The producing states of Arkansas, Kansas, Louisiana and Mississippi also intervened in opposition to federal regulation of

Phillips' sales (R. 6, 1686-1687), but evidence offered by these states was excluded by the examiner on the ground that no gas produced within these states was involved in the proceeding. The Independent Natural Gas Association of America, Old Ocean Royalty Owners Association, Texas County Land and Royalty Owners Asociation, and Texas Independent Producers and Royalty Owners Association also intervened, and took the position that under the Natural Gas Act sales such as those made by Phillips were not subject to federal regulation (R. 6, 1687).

Hearings were held before an examiner from April 3, 1951 to May 23, 1951. The record made before the examiner consisted of nearly 11,000 pages, including approximately 5,800 pages of testimony and nearly 4,000 pages of exhibits. At the conclusion of the hearings before the examiner, the record was certified to the Commission which heard argument on July 9 and 10, 1951 (R. 1686).

On the record presented to the Commission, the facts relating to Phillips' operations may be summarized as follows:

Phillips is primarily an oil company, which also engages in the production, gathering and sale of natural gas (Ex. 29; R. 862-871, 1687-1689). Phillips is an "independent" producer and gatherer of gas, that is to say, it does not own or operate an interstate transmission system by which gas is moved from the fields to consumer markets, and it is not affiliated with any company that owns such a system. All of Phillips' gas operations are carried on in the producing fields (Ex. 82; R. 1839).

The bulk of the evidence taken by the examiner related to Phillips' production, gathering and sales of natural gas in the producing fields of Oklahoma, Texas and New Mexico. The sales involved are made

to five interstate transmission companies: Michigan-Wisconsin Pipe Line Company, Panhandle Eastern Pipe Line Company, Independent Natural Gas Company, El Paso Natural Gas Company, and Cities Service Gas Company (R. 1690-1711). Each of these companies owns and operates an interstate pipe line and is admittedly a natural gas company within the meaning of the Natural Gas Act (R. 1827-1834).

Gas is delivered by Phillips to these five companies from separate gathering systems. Altogether there are nine gathering systems, including ten different processing plants, involved in the transactions between Phillips and the five companies (R. 1691-1710). Five of the gathering systems are located entirely in Texas, one entirely in Oklahoma and one entirely in New Mexico (Exs. 14A-15A, 48-51; R. 814-819, 896-903, 1697, 1699, 1703, 1705, 1710); in the case of the other two gathering systems, the processing plants are located in Texas and the field and the wells and hence the gathering lines lie in both Texas and Oklahoma (Exs. 12A-13A; R. 810-813, 1691, 1695).

The various gathering systems differ in location, size and physical characteristics, but they all have certain features in common: In each case the gathering system includes a network of converging pipe lines and a processing plant or plants (Exs. 12A-15A, 48-51, 86, 91, 103, 104, 111, 116; R. 810-819, 896-903, 1839-1852). In each case the gas, both that produced by Phillips and that which Phillips buys from others and gathers, moves from the wells through the gathering lines to a processing plant which is itself located at some central or convenient point in the field (R. 1743). More than one line serves each of the processing plants involved, and the final commingling of gas from the different lines occurs in each case in the processing plant (Exs. 45A-45H-I; R. 872-895, 1743).

The processing which occurs within the plants consists in the extraction of liquid hydrocarbons and in the removal of hydrogen sulphide or other impurities (R. 1742-1743).

Approximately half of the gas gathered by Phillips is casinghead gas, that is, gas produced from oil wells in conjunction with oil (Exs. 169-177; R. 282-284, 291, 1298-1639). Much of this casinghead gas is not produced by Phillips but is purchased by it from other independent producers under contracts which provide that the price paid by Phillips shall depend in part upon the gasoline content of the gas and in part upon the price which Phillips receives from the sale of residue gas (Exs. 62, 107, 109B, 124; R. 361-363, 1164, 1224-1229, 1283-1284, 1640-1644). The contracts also require Phillips to return residue gas to these producers for use in their operations (R. 362). Pursuant to these contracts Phillips, after processing this casinghead gas, returns a portion of the residue to the independent producers from whom the casinghead gas was purchased, retaining for its own use or sale that part of the gas not required by these independent producers for their operations. Some of the gas so retained by Phillips it uses in its own operations, some is sold to others for local use, but the greater part of this residue gas is delivered to the five interstate pipe line companies (Exs. 169-177; R. 1298-1644).

The residue gas is delivered to the interstate pipe line company at the outlet or exhaust of the plant (R. 1691-1711, 1743-1744). The outlet or exhaust is a pipe that carries the gas to a point within, or at the border of, the plant yard where the gas enters a pipe line owned and operated by the interstate transmission company which is purchasing the gas. The length of these plant exhausts or outlets varies from

approximately 200 to 1490 feet (Ex. 192; R. 1646). In no case does Phillips perform any operation with respect to the gas beyond the plant yard. The transmission companies transport the gas in interstate commerce from the producing fields and resell it either at city gates or at other points for ultimate consumption in consumer markets located in other states.

A plat of Phillips' Goldsmith gathering system, one of the nine systems involved in this case, is attached to this petition.[1] This plat illustrates many of the aspects of the gathering systems that have been referred to in the preceding description. Thus the plat shows Phillips' gathering lines by which gas is collected in the Goldsmith plant, residue lines through which Phillips returns gas to producers from whom it purchases casinghead gas, the interstate transmission line of El Paso Natural Gas Company, into which Phillips delivers gas at the Goldsmith plant (one of the deliveries involved in this case), and another line owned by Sid Richardson through which gas moves from the Goldsmith plant to a local plant, also owned by Richardson, where the gas is used in the manufacture of carbon black.

On the basis of the whole record, including the facts that have been summarized above, the Federal Power Commission, in an opinion issued on August 22, 1951, found that Phillips' movement, processing and sales of natural gas are a part of Phillips' gathering business, or at least exempt under Section 1(b) of the statute as an incident of, or activity related to its gathering business (R. 1742-1744, 1752-1753).[2] The

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[1] The plat is based on Ex. 91 (R. 1843) and Ex. 50 (R. 901).

[2] It is clear from the Commission's opinion that in formulating this finding it adopted the language used by this Court in Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 506, 515.

Commission also found that Phillips' sales were made during the course of production and gathering and that regulation of those sales by the Federal Power Commission would be inconsistent with or would substantially interfere with the state regulation by New Mexico, Oklahoma and Texas (R. 1745-1747, 1753-1755).[3] On the basis of these findings the Commission held that Phillips was not a natural gas company within the meaning of the statute and ordered the proceeding terminated (R. 1753). One member of the Commission concurred on the second ground alone, *i.e.*, that federal regulation would be inconsistent with or would substantially interfere with state regulation, and one member dissented (R. 1753-1822).

The Proceedings in the Court Below

The State of Wisconsin and its Public Service Commission, The City of Kansas City, Missouri, The City of Milwaukee, The City of Detroit, Michigan, and The County of Wayne, Michigan, brought five separate proceedings in the United States Court of Appeals for the District of Columbia Circuit, pursuant to Section 19(b) of the Natural Gas Act, to review and to set aside the Commission's order (R. 1-72). Phillips and the states of New Mexico, Oklahoma and Texas intervened in each of these proceedings in support of the Commission's order (R. 72-117). The Commission appeared in each proceeding in defense of its order. The five petitions were consolidated for hearing by an order of the Court of Appeals dated February 5, 1952 (R. 1853-1854).

On May 22, 1953 the Court of Appeals in an opinion

[3] In form this finding is a close paraphrase of the language used by this Court in its opinion in Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 690.

written by Judge Edgerton and concurred in by Judge Prettyman, with Judge Clark dissenting, set aside the Commission's order, holding that Phillips' sales to the pipe line companies were not immune from regulation under Section 1(b) of the Natural Gas Act (R. 1855-1873). The last paragraph of the majority opinion reads in part as follows (R. 1865):

> "But the validity or invalidity of the Commission's conclusion that Phillips is not a 'natural-gas company' does not turn upon the evaluation of testimony or upon any facts peculiar to this case. It turns upon the generic question whether the exemption of 'production or gathering' in §1(b) of the Natural Gas Act covers interstate sales of gas by the corporation that produced and gathered it. We think the Act and the decisions of the Supreme Court permit only one answer. We think the Commission has applied an erroneous rule of law."

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A QUESTION OF IMPORTANCE IN THE INTERPRETATION AND ADMINISTRATION OF THE NATURAL GAS ACT WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

The question presented in this case is whether sales of gas made by an independent producer and gatherer to an interstate transmission line are subject to regulation under the Natural Gas Act. An "independent" producer or gatherer of natural gas is one whose activities in the gas industry are confined to the production, gathering, processing and sale of gas in the gas fields, who does not own or operate an interstate transmission line by which gas is carried from the field to consumer markets, and who is not affiliated with any

company that does own or operate such a line.[4] Phillips is an independent producer and gatherer in this sense and is not "a natural-gas company" within the meaning of the Natural Gas Act unless its sales to interstate transmission companies make it one.

Section 1(b) of the Natural Gas Act provides that the statute shall apply to the transportation of natural gas in interstate commerce, to its sale in interstate commerce for resale, and to natural gas companies engaged in such transportation or sale, but shall not apply "to the production or gathering of natural gas." This is the first case in which this Court has been called upon to consider the application of the statute to sales of gas made to an interstate transmission company by an independent producer or gatherer. The company involved in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682 was an interstate transmission company, and in that case this Court expressly reserved for future decision the question of the jurisdiction of the Federal Power Commission over sales of gas made by independent producers and gatherers. See pp. 37-39, *infra.* In *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324

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[4] The use of the word "independent" to denote the difference between producers and gatherers who do nothing but produce, gather, process and sell in the gas fields, on the one hand, and the interstate transmission companies which produce, gather, and transport by pipe line to consumer markets, on the other, is well recognized in the industry and by commentators. See, for example, Federal Trade Commission Report to the Senate, pursuant to Senate Resolution 83, 70th Cong., 1st Sess., Senate Document 92, p. 479 and the Report of Commissioners Smith and Wimberly, Natural Gas Investigation (Docket No. G-580) 1948 (U. S. Government Printing Office) pp. 156, 164, 171, 172, 173-174; Berger and Krash, Status of Independent Producers under the Natural Gas Act, 30 Tex. L. Rev., p. 29, footnote 1.

U.S. 581, a case which involved merely a question of rate making method, the company concerned was also an interstate transmission company, and the sales involved were admittedly subject to the Commission's jurisdiction. See pp. 36-37, *infra*.

In the 15 years that have passed since the enactment of the Natural Gas Act, the Federal Power Commission has never attempted to regulate sales for resale in interstate commerce made in the field by independent producers or gatherers; on the contrary, in a series of decisions beginning with *Columbian Fuel Corporation*, 2 F.P.C. 200, in 1940, the Commission has disclaimed authority to regulate such sales.[5]

The decision of the court below is the first decision that applies the provisions of the Natural Gas Act to sales made in the field by an independent producer and gatherer to an interstate transmission company. The decision appears to hold that the Federal Power Commission is under a statutory duty to regulate sales to an interstate transmission company made by an independent producer or gatherer at the end of the physical activities of production or gathering.

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[5] See also The Fin-Ker Oil and Gas Production Co., 6 F.P.C. 92 (1947); Tennessee Gas and Transmission Company and The Chicago Corporation, 6 F.P.C. 98 (1947); Kansas-Nebraska Natural Gas Co. Inc., 6 F.P.C. 664 (1947); R. J. and D. E. Whelan, 6 F.P.C. 672 (1947); Hassie Hunt Trust, 6 F.P.C. 835 (1947); Sinclair Prairie Oil Co., 6 F.P.C. 1059 (1947); La Gloria Corp., 7 F.P.C. 349 (1948); The Superior Oil Co., 7 F.P.C. 627 (1948).

The majority of the Court of Appeals did not refer to the Federal Power Commission's administrative interpretation of the statute. In contrast, it should be noted that this Court in Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 513, attached importance to the fact that the Commission had never claimed the right to exercise the authority asserted in that case.

The opinion of the majority of the Court of Appeals states that the issue involved does not turn "upon any facts peculiar to this case," but rather "upon the generic question whether the exemption of 'production or gathering' in § 1(b) of the Natural Gas Act covers interstate sales of gas by the corporation that produced and gathered it." The Court of Appeals held that this "generic question" must be resolved in favor of federal regulation. Its decision has consequences that transcend the particular facts involved in this case. In effect the decision requires the Federal Power Commission to undertake the regulation of an entire segment of the natural gas industry that has hitherto not been subject to federal regulation.

Apart from Phillips, there were in 1946 approximately 2300 other independent producers or gatherers who sell gas directly to natural gas companies (R. 728-731).[6] Presumably some or all of the sales of these

[6] It has been estimated that there are approximately 8000 independent producers of natural gas in the United States. See Report of Commissioners Smith and Wimberly, Natural Gas Investigation, Federal Power Commission, Docket No. G-580 (U. S. Government Printing Office) p. 194. This number presumably includes the 2300 who are known to sell gas directly to interstate transmission companies. Independent producers who do not now sell gas in interstate commerce directly to interstate transmission companies may, under the decision of the Court of Appeals, become subject to federal regulation if at any time in the future they should decide to make such sales. And even if these independent producers do not sell directly to interstate transmission companies, the return that they now receive for their gas may be substantially affected by federal regulation. For example, the price Phillips pays independent producers for casinghead gas depends in part upon the price Phillips receives for the sale of the residue gas. See p. 6, *supra*. Federal regulation of Phillips' sales to the interstate transmission companies will directly affect the prices which these producers receive at the wellhead.

other independent producers or gatherers must be regulated by the Federal Power Commission if the decision of the court below is correct.

The consequences of the decision of the Court of Appeals cannot be fully described merely in terms of the regulation of the prices charged in certain sales of gas in interstate commerce. If, as the Court of Appeals held, Phillips is a "natural-gas company" in the statutory sense, then the Commission may fix the rate of return received on all of the producing and gathering facilities used in the gas operations involved in this case. See *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U.S. 581. To do this the Commission, in many instances, would have to allocate investment and operating costs as between Phillips' gas operations and its petroleum operations since the same physical facilities are used in both. The same consequences would follow in the case of other independent producers or gatherers similarly situated.

The business of producing and gathering natural gas as it is carried on by the independents bears little resemblance to the quasi-public services provided by the interstate transmission companies. The business of discovering deposits of oil and gas, reducing the gas to possession and gathering it for delivery to a buyer, must be conducted within the limits of detailed state regulations designed to conserve gas and to avoid waste in its production and exploitation. In most cases, as is true of Phillips, the gas operations of these independents are incidental or ancillary to larger operations in the petroleum industry, and the physical facilities they use in their gas operations are also an integral part of their petroleum business.

The regulation of this segment of the gas business, involving, as it will, the supervision of the activities

of hundreds of independent businessmen,[7] the segregation of investment as between gas operations and petroleum operations, the determination of a rate base and the fixing of a rate of return for a business whose success depends upon continuing capital expenditures for exploration, and the day-to-day adjustment between federal regulatory power and the regulatory measures of the states, will present the Federal Power Commission with problems of an intricate, novel and complex character. The Commission should not be required to embark upon this task until its authority to undertake regulation has been definitely established by a decision of this Court.

This case also raises an important question of the relation between federal and state regulatory power. The producing states of Oklahoma, Texas and New Mexico, within whose boundaries the gas fields involved in this case lie, intervened before the Commission and in the Court of Appeals and resisted federal regulation of Phillips' sales on the ground that it would be inconsistent with and interfere with the states' exercise of their valid regulatory authority. On the basis of evidence that these states presented to the Commission, it found that federal regulation of Phillips' sales would cause the conflict feared by the states. The Court of Appeals disregarded this finding. See pp. 32-36, *infra.*

This Court has recognized that the producing states have a legitimate local interest in the exploitation of the gas reserves that lie within their boundaries. It

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[7] The increase in the size of the regulatory problem is indicated by the fact that in 1947 there were 2300 independent producers and gatherers who sold directly to natural gas companies (R. 728-731) as compared with some 115 natural gas companies then subject to regulation by the Federal Power Commission. Statistics of Natural Gas Companies, 1947, p. v.

has also recognized that a direct and substantial relationship exists between this legitimate local interest of the states and the prices received in the field by producers and gatherers. See *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179. If the Natural Gas Act authorizes federal regulation of the field prices charged by independent producers and gatherers in transactions with interstate transmission companies, this federal power is dominant. Its bare existence may, its exercise certainly will, invalidate conflicting or inconsistent state regulations. Cf. *Illinois Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498; *Public Utilities Commission of Ohio* v. *United Fuel Gas Company*, 317 U.S. 456.

Whether the intrusion of federal regulation in this field of activity that has hitherto been reserved to the states, will conflict with state regulation, as contended by the producing states and as found by the Commission, or whether that conflict is "immaterial," or, as a matter of law, cannot exist, as suggested by the Court of Appeals, is a question which should be resolved by this Court.

II. THE DECISION OF THE COURT BELOW IS WRONG AND SHOULD BE REVERSED.

A. THE INTERPRETATION OF THE NATURAL GAS ACT ADOPTED BY THE COURT BELOW IS INCONSISTENT WITH THE INTENT OF CONGRESS AS IT IS EVIDENCED BOTH BY THE WORDS OF THE STATUTE AND BY ITS LEGISLATIVE HISTORY.

The Court of Appeals stated its construction of the last clause of Section 1(b) of the Natural Gas Act in the following words:

> "It proceeds to exempt both 'local distribution' and 'production or gathering', but it exempts nothing between 'production or gathering' and 'local distribution.' The exemption of production

or gathering does not exempt sales made after production and gathering have been completed."

With this construction of the statute as a premise, the Court of Appeals held that Phillips' sales, as a matter of law, are made after production and gathering are complete and therefore are subject to regulation. It is not entirely clear whether in so holding the Court of Appeals meant that Phillips' sales were immediately preceded by activities, (for example processing or "transportation" in the statutory sense) that could not be covered by the words "production or gathering," or whether it meant that whatever might be the status of the immediately preceding activities, the sales in any event occurred immediately at the end of production and gathering and hence were made after production and gathering were complete.

Although there are statements in the opinion that might appear to support the first of these interpretations,[8] the second interpretation seems to be more

[8] The Court of Appeals mentions that "processing has intervened" before the sales are made and that the gas moves short distances through the outlets of the processing plants (240 feet in the example mentioned by the court) to the pipe lines of the transmission companies. It also states that the sales are made "after the gas has been gathered in the trunk lines" (R. 1862). The court, however, does not appear to have held "generically" that processing can never be a part of production or gathering. For the reasons stated in the text it seems unlikely that the court intended to base its decision on the ground that, on the particular facts of this case, Phillips' processing was not a part of production or gathering, or on the ground that on the facts Phillips was engaged in the transportation of gas in interstate commerce in the statutory sense. If the court intended to rest its decision on such grounds, it improperly disregarded the findings made by the Commission as is pointed out at pp. 28-31, *infra*.

consistent with the general tenor of the opinion. There was no dispute before the Commission or the Court of Appeals that the delivery of the gas to the transmission companies was the final or culminating step in Phillips' operations. But the question whether the activities immediately preceding the sales were a part of production and gathering was in dispute and was litigated before the Commission. On the basis of the whole record, the Commission found that those activities were a part of production and gathering. Under the usual rules of judicial review, this finding of the Commission should have been upheld if supported by substantial evidence. See pp. 28-31, *infra*. If the court below had intended to hold that the activities preceding the sales were not a part of production and gathering, surely it would have appraised the evidence on which the Commission's finding rested. And if the court below had intended to make an independent determination as to whether those activities were a part of production and gathering, surely it would have recognized that the determination turned on facts peculiar to Phillips' operations. It also seems likely that if the court had intended to hold that the activities preceding the sales were not a part of production and gathering, it would have attempted to define the point in time and space at which it held that Phillips' producing and gathering activities ended.

None of these considerations is reflected in the court's opinion; the court treated the case as if it involved no disputed questions of fact, it expressly stated that the ultimate issue did not turn "upon any facts peculiar to this case," it did not attempt to define the point in time and space at which Phillips' producing and gathering activities ended, and it, in effect,

dismissed the findings of the Federal Power Commission as irrelevant. Taking all of these considerations together, it seems fair to conclude that the Court of Appeals held that Phillips' sales were made after production and gathering were "complete" because the sales occurred at the end of production and gathering.

On any view of the reasoning of the Court of Appeals, it is clear that the court construed the words "production or gathering" in Section 1(b) as describing certain physical activities and not as describing the performance of an economic function or the conduct of a business. This construction of the words was essential to the court's conclusion that Phillips' sales are made after production and gathering are complete. It can hardly be disputed that on the record in this case both the processing and the sales are a part of and an incident of the business of producing and gathering natural gas. The Commission so found, and its findings were fully supported by the evidence. The sale of gas is the ultimate economic purpose for which an independent produces and gathers gas. Phillips' drilling of wells, its collection of gas in the processing plants, its processing to extract liquid hydrocarbons and to improve the salability of the gas by removing impurities, are all intermediate steps toward that ultimate end. Thus, if the words "production or gathering" are regarded, as they should be, as covering the conduct of a business, or the performance of an economic function, production and gathering are not complete until the gas is sold.

The reasoning of the Court of Appeals, on the other hand, rests on a distinction between the different activities involved in the single business or economic process of production and gathering. That court apparently

regards Phillips' acts in drilling wells, removing gas from the ground, and collecting the gas at a common point, as falling on one side of the statutory line, and the act of delivery to the interstate transmission companies and, possibly, the act of processing, as falling on the other. Any such distinction must depend for its validity upon different physical qualities and conditions of the acts in question, because the distinction cannot be defended in economic terms.

The Court of Appeals erred in thus construing the words "production or gathering" as meaning only part and not all of the business of production and gathering, and in determining the application of the statutory words solely by a physical test without regard to the economic function involved or the nature of the business sought to be regulated. Both the words of the statute and its legislative history show the Act was conceived and drafted in terms of the economic functions performed by various branches of the gas industry. The economic function or business of local distribution at one end of the economic process, and the economic function or business of production and gathering at the other, were to be free of federal regulation. The economic function or business of transporting gas from the producing fields to the consuming market, the intermediate stage of the process, was to be regulated because it was in that aspect of the industry that economic evils were believed to exist. Congress intended to regulate the business of the interstate transmission companies who owned and operated pipe lines by which gas was carried from the producing fields to consumer markets. It did not intend to regulate the business of independent producers or gatherers of natural gas, or any of the in-

cidents of that business including sales for resale in interstate commerce.[9]

The intent of Congress is evidenced by the specific exclusion of "production or gathering" in subsection (b) of Section 1. It is also evidenced by subsection (a) of Section 1. That subsection begins by referring to reports of the Federal Trade Commission made to Congress pursuant to Senate Resolution 83 (70th Cong., 1st Sess.), and then states, ". . . it is hereby declared that *the business of transporting and selling natural gas for ultimate distribution to the public* is affected with a public interest, and that Federal regulation in matters relating *to the transportation of natural gas* and *the sale thereof in interstate and foreign commerce* is necessary in the public interest." (Italics supplied) The words thus used to describe *the business* which Congress intended to regulate are words that describe the business of the interstate transmission companies, not the business of an independent producer or gatherer.

The provisions of Section 7(c), as amended in 1942, also evidence an intent not to regulate sales of independent producers and gatherers at the end of gathering. That section now provides that no one shall engage in the sale of natural gas that is subject to the jurisdiction of the Commission, or construct or operate facilities for such a sale, without first obtaining a certificate of public convenience and necessity from the

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[9] This is the view reached by independent commentators who have examined the legislative history. Comment, 59 Yale L. J. 1468, 1479-80, 1510 (1950); Note, 52 Col. L. Rev. 135, 136 (1952); Berger and Krash, Status of Independent Producers under the Natural Gas Act, 30 Tex. L. Rev. 29, 61 (1951).

Commission. Gathering facilities are clearly excluded from regulation by Section 1(b); it is inconceivable that the provisions of Section 7(c) could have been intended to apply to gathering facilities. Yet if a sale at the end of gathering is subject to the Commission's jurisdiction, Section 7(c) on its face would appear to cover the gathering facilities from which such sales are made. Where one construction of Section 1(b) will make it conflict with Section 7(c) and another construction will harmonize the two, the latter construction should be adopted, particularly where, as here, that construction conforms with the original intent of Congress as reflected by the legislative history of the Act.

The reference in Section 1(a) to the reports of the Federal Trade Commission is significant because it shows that Congress was prompted to pass the Natural Gas Act by disclosures made in the investigation of public utility corporations and holding companies conducted by the Federal Trade Commission pursuant to Senate Resolution 83, 70th Cong., 1st Sess.[10] The portions of that report dealing with the natural gas industry were directed to the necessity for regulating the interstate transmission companies. The evils pictured in the report as requiring regulation were evils that resulted from the monopoly control by the interstate transmission companies of the "vital link

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[10] S. Doc. 92, Part 84-A, ch. XII, Final Report, Federal Trade Commission to the Senate, pursuant to S. Res. 83, 70th Cong., 1st Sess., hereinafter referred to as "FTC Report."

In Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 610, this Court treated the FTC Report as relevant to the question of Congressional purpose.

of transportation" (FTC Report, p. 610); they were not evils that related in any way to the prices charged by independent producers and gatherers. The report did not recommend that the prices charged in the field by independent producers and gatherers should be regulated. On the contrary, the report depicted independent producers and gatherers as standing in need of protection against the monopolistic, predatory and discriminatory practices of the large interstate transmission companies (see particularly FTC Report, pp. 583, 591-592, 602, 608-611).[11]

The first hearings on proposed legislation to regulate the natural gas industry were held in the 74th Congress, 2d Session, by a subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives on a bill designated as H.R. 11662. That bill, which was a predecessor of the bill that was finally enacted into law, has been described by this Court as "substantially similar to the Natural Gas Act." *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 505 (Footnote 7). Dozier A. DeVane, Solicitor for the Federal Power Commission, who had helped draft the bill, was the first witness before the committee. He explicitly and repeatedly stated that the legislation was not intended to regulate field prices, "gathering rates" or "the gathering business." The relevance of these statements and their weight in construing the statute need no justification or comment, because the statements were expressly cited and relied upon by this Court in its opinion in *Federal Power Commission* v. *Panhandle*

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[11] See also the remarks of Colonel Chantland of the Federal Trade Commission staff in the Hearings on H.R. 11662, 74th Cong., 2d Sess. (Hearings, p. 51).

Eastern Pipe Line Co., 337 U.S. 498, 505 (Footnote 7).[12]

Throughout the subsequent course of the legislative history, the committee hearings and reports and the debates show that Congress intended to limit federal regulation to the business of the interstate transmission companies, that is, the business of transporting gas from the producing fields to consumer markets, including sales for resale made in the course of that business, and that Congress did not intend to regulate the activities of independent producers or gatherers or any sales made by them at arms-length in the gas fields to interstate transmission companies.[13]

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[12] Mr. DeVane's statements are set forth in part in Footnote 7 (337 U.S. at p. 505) of the Court's opinion. Similar statements made by Mr. DeVane, which are not quoted in the footnote, appear at pp. 28 and 42-43 of the committee hearings (Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 2d Sess., on H.R. 11662).

[13] See Hearings on H.R. 11662, 74th Cong., 2d Sess., 1936, 11-12, 17, 24, 27-34, 47-53, 55-57, 68-70, 72, 85-86, 89-90, 111, 150-159; H. Rep. 2651, 74th Cong., 2d Sess., 1936, 1-2; Hearings on H.R. 4008, 75th Cong., 1st Sess., 1937, 24-34, 39, 48-52, 70, 84 *et seq.*, 121-122; H. Rep. 709, 75th Cong., 1st Sess., 1937; 81 Cong. Rec., 6721-6723, 9312-9315; 83 Cong. Rec., 8343-8347.

The legislative history contains a few references to sales by "producing companies." In each case the reference is made in a context that makes it clear that the reference is to an integrated transmission company which also produces gas. For example, in the hearings on H.R. 4008 before the Committee on Interstate and Foreign Commerce of the House of Representatives in the 75th Congress, 1st Session, one of the witnesses stated that the "wholesale rate" subject to regulation under the bill was the rate "under which either a transmission company or a *producing and transmission company* sells natural gas." (Italics supplied) (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong., 1st Sess., on H.R. 4008, p. 39.)

The opinion of the Court of Appeals does not disclose that the majority ever considered the legislative history viewed as a whole. It indicates rather that the majority relied primarily upon a single aspect of that history, *i.e.*, the consideration given by Congress to the so-called "gap" in regulatory authority. The majority opinion points out that the committee of the House of Representatives in reporting the bill that became the Natural Gas Act stated that its purpose was to close the regulatory "gap" created by Supreme Court decisions holding that the states had no power to regulate sales made in interstate commerce by transmission companies. The opinion asserts that at the time the statute was passed the states lacked authority to regulate sales of the kind made by Phillips, and that it follows that its sales fall within the scope of the statute.

This reasoning misconceives the relationship between the so-called "gap" in regulatory authority and the intent of Congress. The legislative history, as a whole, shows that Congress did not decide what business or economic function it wished to regulate solely by reference to the then existing state of constitutional law. The question of what business or economic function was to be regulated was an economic question, and in the first instance Congress dealt with it in economic terms. The Federal Trade Commission Report had disclosed that the evils existing in the gas industry were a result of the position and practices of the interstate transmission companies. Accordingly, it was the business of those companies that Congress determined to regulate. There was no evidence presented to Congress of any practices by independent producers or gatherers that had created, or threatened

to create, any economic problems or evils that required federal regulation. Because there were no evils in that aspect or function of the industry that required correction, there was no occasion for Congress to consider whether any gap existed in the power to regulate independent producers or gatherers. The "gap" in regulatory authority was conceived and considered by Congress in terms of the activities of the interstate transmission companies and not in terms of the activities of independent producers or gatherers. The court decisions that were called to the attention of Congress as evidencing the "gap" *e.g., Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.,* 273 U.S. 83 and *Missouri* v. *Kansas Natural Gas Co.,* 265 U.S. 298, involved the activities of interstate transmission companies and not the activities of independent producers or gatherers of gas. Even if it were true that a "gap" existed in the authority to regulate the activities of independent producers or gatherers, as distinguished from the activities of interstate transmission companies, that particular "gap" was not called to the attention of Congress. There was no reason for Congress to consider such a "gap" because it was not proceeding on the assumption that the activities of independent producers and gatherers required regulation.

Consideration of the constitutional status of state regulatory power at the time the Natural Gas Act was passed throws additional light on the nature and limits of the "gap" that Congress intended to close. At that time it had long been recognized that the states might regulate matters of local concern even though the regulation affected interstate commerce. *Willson* v. *Black-bird Creek Marsh Co.,* 2 Pet. 245; *Cooley* v. *Board of Wardens of the Port of Philadelphia,* 12 How. 298; *South Carolina State Highway Department*

v. *Barnwell Brothers, Inc.*, 303 U.S. 177, 184-185, 188-189. It had also long been recognized that the states had a special interest in natural gas and that its regulation touched rights of "an essentially local character." See *Ohio Oil Company* v. *Indiana, (No. 1)*, 177 U.S. 190, 211-212; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Pierce Oil Corp.* v. *Phoenix Refining Company*, 259 U.S. 125; *Walls* v. *Midland Carbon Co.*, 254 U.S. 300, 319; *Bandini Petroleum Co.* v. *Superior Court, Los Angeles County, Calif.*, 284 U.S. 8; *Henderson Co.* v. *Thompson*, 300 U.S. 258, 264. It can hardly be doubted that under these long standing principles of constitutional law the producing states had authority to regulate, for some purposes, sales of gas made in the gas field by a producer or gatherer even though the sales occurred in interstate commerce. Indeed it was in reliance on these principles that this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, held that the state of Oklahoma (one of the producing states concerned in this case) could validly fix minimum field prices for gas even though the gas was sold in interstate commerce.[14]

Congress recognized and deferred to the existence of this state regulatory authority. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 509-513; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 690; and cf. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 521, 523-524.

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[14] In its opinion this Court cited Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 298 and South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177, decisions which antedated passage of the Natural Gas Act.

The relation between the field prices received by independent producers and gatherers and the conservation measures of the states was well known at the time the Natural Gas Act was passed. Congress was aware of this relationship and undoubtedly recognized that federal regulation of the field prices charged by independent producers and gatherers would be bound to affect these regulatory measures of the states. This consequence would follow without regard to whether the state regulation was the same kind of regulation provided for in the Natural Gas Act, and without regard to whether the states under the constitution could regulate for the same purposes that prompted passage of the Natural Gas Act. The states had authority under the constitution to regulate sales like those made by Phillips in some ways and for some purposes; they also had authority to impose other regulations that would be directly and substantially affected by federal regulation of sales like those made by Phillips. Congress, in closing the "gap" in regulatory authority, did not intend to authorize the Federal Power Commission to intrude in any general regulatory area in which its exercise of power might conflict or interfere with regulations of any character that the producing states were competent to impose.

B. THE COURT BELOW IMPROPERLY DISREGARDED THE FINDINGS MADE BY THE FEDERAL POWER COMMISSION.

1. THE COMMISSION'S FINDING THAT PHILLIPS' SALES WERE MADE DURING THE COURSE OF PRODUCTION AND GATHERING.

Congress did not attempt to define the particular activities covered by the words "production or gathering," nor did it lay down in the statute a rigid rule for determining the point in time and space at which production or gathering end. Congress delegated to the

Federal Power Commission authority to apply the general words of the statute to particular situations and to determine, on the facts of each case, the point in time and space at which production and gathering end.[15] This Court has repeatedly said that such a determination by the administrative agency whose duty it is, in the first instance to apply the statute, should be accepted if it is supported by the evidence and has a reasonable basis in law. See *United States* v. *Wabash R. Co.*, 321 U.S. 403, 408; *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 153-154.

The Commission found on the record as a whole that Phillips' sales of gas to the interstate transmission companies are made during the course of production and gathering (R. 1745) and that the sales are made as a part of Phillips' gathering business, or they are incidents of or activities related to that business (R. 1742-1744, 1752-1753). The Court of Appeals' treatment of this finding cannot be justified under any permissible interpretation of the statute or by any established principles of judicial review.

We have pointed out at pp. 16-18, *supra*, that on one

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[15] Similarly, Congress has authorized the Interstate Commerce Commission to determine "the point in time and space at which the carrier's transportation service ends." See United States v. Wabash R. Co., 321 U.S. 403, 408. And compare the Congressional delegation of authority to the Director of the Bituminous Coal Division of the Department of Interior to determine whether a person was both a producer and a consumer of coal so as to be entitled to exemption under the Bituminous Coal Act of 1937. See Gray v. Powell, 314 U.S. 402.

view of its opinion the Court of Appeals did not reject this finding on the ground that it is unsupported by the evidence; the court avoided the impact of the finding by construing the words "production or gathering" as covering only some of the activities performed in the course of the business of production and gathering and by holding that a sale made at the end of production and gathering was not one of the activities excluded from regulation. If this construction of the statute was wrong, as we contend it was, and if the words "production or gathering" in Section 1(b) are construed, as they should be, to cover the whole of the business of production and gathering, then the Commission's finding that Phillips' sales were made as a part of producing and gathering has a reasonable basis in law and, since it is also fully supported by the evidence, should have been accepted by the court below.

The opinion of the Court of Appeals may, however, be regarded as resting on the narrower ground that in the circumstances of this case Phillips' sales were immediately preceded by particular activities, for example, processing, that are not "production or gathering" in the statutory sense. See pp. 16-17, *supra*. Since the Commission found that these activities were a part of production or gathering (R. 1742-1744, 1752-1753), the Court of Appeals could not have rested its decision on this ground without rejecting the finding of the Commission and, in effect, substituting a finding of its own.

Whatever may be the case with respect to the broad question whether all sales made at the end of production and gathering are subject to the statute, it is clear

that the question whether particular activities are covered by the statutory words "production or gathering" is committed in the first instance to the judgment of the Federal Power Commission, and that in exercising its judgment the Commission is required to consider and pass upon matters of fact.

Under the usual rules of statutory construction, Congress must have intended that in applying the words "production or gathering" to particular activities, the Commission should be guided by the meaning that those words customarily bear in the gas industry.[16] What that meaning is raises a question of fact. In this case the Commission considered that question of fact in deciding that the physical activities preceding Phillips' sales are a part of production and gathering (R. 1690-1691). In addition, the application of the general meaning of the statutory words to particular activities requires consideration of other questions of fact. For example, the question whether processing is a part of production or gathering may, in a particular situation, depend upon where the processing takes place, what business the processing is a part of, and in general what economic and physical relationship exists between the processing and other activities that are admittedly covered by the statutory language. Similarly the question whether particular pipe lines are gathering lines or interstate transmission lines is a question that requires consideration of

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[16] O'Hara v. Luckenbach S. S. Co., 269 U.S. 364, 370; United States v. Maher, 307 U.S. 148, 155; Order of Conductors v. Swan, 329 U.S. 520, 525; Carter v. Liquid Carbonic Pacific Corporation, 97 F. 2d 1 (9th Cir. 1938); Roberts v. Tennessee Coal, Iron & R. Co., 255 Fed. 469 (5th Cir. 1919) *cert. denied* 250 U.S. 659.

the facts relating to both the economic function of the lines and their physical characteristics.[17]

The Commission resolved factual questions of this kind when it decided that the activities immediately preceding Phillips' sales are a part of production and gathering. That decision was an exercise of the "expert, experienced judgment" of the administrative agency charged by Congress with the duty of applying the general words of the statute to particular situations. Compare *Gray* v. *Powell,* 314 U.S. 402, 413. This Court has repeatedly said that such a determination should be accepted by a reviewing court if it is supported by substantial evidence. *Gray* v. *Powell,* 314 U.S. 402, 413; *United States* v. *Wabash R. Co.,* 321 U.S. 403.

2. The Commission's finding that federal regulation of Phillips' sales would conflict with state regulation.

In *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 690, this Court stated that where sales of gas in interstate commerce are made

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[17] No doubt any movement of gas destined for interstate transportation (beginning at the point at which the gas leaves the ground) is interstate movement in the sense that it is subject to the power of Congress, but the words "transportation of natural gas in interstate commerce" in Section 1(b) of the statute can hardly be read to apply to all such movement. If the words should be read in that way all gathering of gas intended for interstate transportation would be subject to federal regulation from the time the gas left the ground, and the exclusion of "gathering" in Section 1(b) would be meaningless. The determination of the point at which the gathering movement ends and "transportation," in the statutory sense, begins must be made in the first instance by the Commission on the basis of its appraisal of the relevant facts.

during the course of production and gathering and "are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach."

In addition to finding that Phillips' sales were made during "the course of production and gathering," the Commission also found that the sales are so connected with the local incidents of production or gathering as to make rate regulation by the Commission "inconsistent or a substantial interference with the exercise by the affected states of their regulatory function" (R. 1745). The Commission took the view that its finding that Phillips' sales are made in the course of production and gathering was in itself a sufficient basis for denial of jurisdiction and that its finding that regulation of Phillips' sales would conflict with state regulations coupled with the finding that the sales were made during the course of production and gathering supplied an additional ground for its decision (*Id.*).

The Commission's finding that federal regulation of Phillips' sales would conflict with state regulatory measures is fully supported by the evidence. Much of the evidence that supports the finding was presented by the intervening states of Oklahoma, Texas and New Mexico (R. 375-592, 602-619).

The state of Oklahoma has fixed the minimum field prices to be received by producers as a condition to the production of gas in the Guymon-Hugoton Field (Exs. 119, 120, 120A; R. 1246-1283). The orders made by the administrative agency of the state of Oklahoma

in the Guymon-Hugoton Field were before this Court and their constitutionality sustained in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179. Phillips produces gas in that field and the state of Oklahoma has construed its orders as applying to some of Phillips' transactions that are involved in the instant case. See *Phillips Petroleum Co.* v. *Oklahoma*, 340 U.S. 190.

The states of Texas and New Mexico have not attempted to fix minimum prices in the field; their representatives testified that those states have deliberately adopted the policy of permitting field prices of gas to be fixed by competition rather than by regulation (R. 426-427, 431, 457-461, 464-465, 556-557). The regulation of field prices by federal authority would conflict directly with this price policy of the two states.

The conflict envisaged by this Court in its statement in the *Interstate* case is not limited to the clash of conflicting price orders or price policies. Federal regulation of field prices of natural gas, as the Commission found, will directly conflict with other regulatory measures adopted by the states which do not operate directly upon prices, but which are affected by prices, or which depend for their effectiveness and validity upon the prices which producers and gatherers receive in the field. The states of Oklahoma, Texas and New Mexico have all adopted such measures as proration, unitization, and regulations relating to premature abandonment, drilling, flaring, well spacing, etc. (R. 375-592, 602-619). On the basis of the evidence before it, the Commission found that federal regulation of Phillips' sales would be inconsistent with and would conflict with these state regulatory measures.

In so finding, the Commission pointed out, among other things, that a direct relation existed between price and conservation and that fixing of maximum prices by a federal agency would, by reducing the return of the producers, run counter to state conservation efforts (R. 1745-1747).

The court below held that the Commission erred as a matter of law in finding that Phillips' sales were made during "the course of production and gathering," and on that ground dismissed the Commission's finding with respect to conflict with state authority as "immaterial" (R. 1863).[18] At the same time, the majority of the court stated that it did not intend to imply that the Commission's finding of conflict with state regulatory authority was "supportable" and added, "On the contrary, as the Supreme Court has held, federal protection of consumers against exorbitant rates is not inconsistent with the exercise by the producing state of its regulatory functions. *Interstate Natural Gas* case, . . ." (R. 1863-1864).

We submit that the Court of Appeals erred in holding that Phillips' sales were not made during production and gathering. See pp. 18-31, *supra*. The court also erred in assuming that Phillips' sales are subject to regulation unless it is shown *both* that the sales are made during the course of production and gathering

[18] This statement occurs in footnote 11 of the court's opinion. The text surrounding the footnote appears to assume that the Commission did not find both that the sales were made "during the course of production and gathering" and that federal regulation of the sales would conflict with the exercise by the states of their regulatory functions. The Commission's finding is clearly in the conjunctive and not the disjunctive (R. 1745), and the court's assumption to the contrary was mistaken.

and that regulation of the sales would conflict with state authority. The Natural Gas Act was not intended by Congress to apply to sales made by independent producers or gatherers during the course of their business. See pp. 19-27, *supra*. It follows that once it is determined that a sale is made by an independent producer or gatherer during the course of production and gathering the statute does not apply. In those circumstances, no more specific showing of conflict with state authority is required.

In any event the Court of Appeals erred when it suggested that the Commission's finding on the point of conflict was not "supportable." That finding was supported by substantial evidence. In fact, the Commission's finding on this point is entitled to particular weight. Not only is the Commission experienced in the industry and familiar with the character and purpose of state gas regulation, but it is the agency that would administer and enforce federal regulation. The Commission is, therefore, in a better position than any reviewing court to measure the consequences that might reasonably be expected to follow the exercise of the federal authority here asserted.

The court below, although indicating that it thought the Commission's finding not supportable, did not explain why it believed the evidence before the Commission was inadequate. The reference to the *Interstate* case suggests that the court was expressing the view that as a matter of law there could be no conflict between federal regulation and the exercise by the producing states of their regulatory functions. The reference to the *Interstate* opinion is obscure; nothing in the language of the opinion suggests that as a

matter of law conflict could not exist. On the contrary, the opinion plainly recognizes the possibility of conflict. In this respect the statement by the Court of Appeals appears to be in direct conflict with the views expressed by this Court.

C. THE COURT BELOW MISINTERPRETED AND MISAPPLIED DECISIONS OF THIS COURT.

The opinion below states ". . . the Supreme Court has repeatedly upheld the Commission's authority under the Natural Gas Act to regulate the rates at which a producer and gatherer of natural gas sells it, after producing and gathering it, to pipeline companies for resale in other states" (R. 1860). The two decisions of this Court cited to support this statement are *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U.S. 581 and *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682. Neither of these cases held that the Natural Gas Act applies to sales made by an independent producer or gatherer at the end of production or gathering. In the *Colorado Interstate Gas Co.* case the question was not whether the reference to "production or gathering" in Section 1(b) precluded regulation of the rates; the sale in that case was made by one interstate transmission company to another interstate transmission company with which it was affiliated through stock ownership, and was admittedly the kind of sale covered by the statute. The question was whether the reference to "production or gathering" in Section 1(b) prevented the Federal Power Commission, as a matter of rate making procedure, from including in the rate base the production and gathering properties.

This Court held that the properties might be included.[19] That decision is not a precedent for regulation of sales made by an independent producer and gatherer. See *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 506-507.

In *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, the sales were made by a company that was admittedly a natural gas company in the statutory sense apart from the sales in question. The sales were made by Interstate as a part of its interstate transmission business to other interstate transmission companies. Physically the sales were made out of interstate transmission lines which were in fact the lines by which Interstate carried gas from the producing fields to consumer markets. The sales were not made immediately at the end of, or as the culmination of the gathering process but were made after interstate transportation, in the statutory sense, had begun. The Federal Power Commission had found that the gathering process was complete at some point prior to delivery of the gas (see 331 U.S. 682, 692). All of these facts taken together show that the sales were not made during the course of any aspect of Interstate's business that might properly be described as the business of producing or gathering; on the contrary, the sales were made during the course

[19] This Court did not hold that the Commission was required to include the producing and gathering properties in the rate base; its holding on Section 1(b) was confined to the point that the section did not prohibit the inclusion of the properties. The decision can properly be regarded as a reiteration and application of the holding in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, that in a proceeding to review a rate order it is "the result reached not the method employed which is controlling." (324 U.S. at p. 603)

of the business of transporting gas from the producing field to consuming markets.

It should also be noted that in the *Interstate* case there was no evidence that federal regulation of Interstate's sales would conflict with state authority; Louisiana, the producing state involved, had participated in the proceedings before the Federal Power Commission and did not oppose federal jurisdiction or contend that its exercise would conflict with state regulatory measures (see 331 U.S. 682, 691).

In its opinion in the *Interstate* case this Court disavowed any intention of deciding whether sales made by an independent producer or gatherer are subject to the Commission's jurisdiction. The Court referred to the *Columbian* case, 2 F.P.C. 200 (1940) (in which the Commission applied the same jurisdictional test that it used in the instant case) and the *Billings* case, 2 F.P.C. 288 (1940), and stated (331 U.S. 682, 690-691, footnote 18):[20]

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[20] In the Columbian case, 2 F.P.C. 200 (1940), the Commission held that it did not have jurisdiction under the Natural Gas Act to regulate rates charged for sales of natural gas in interstate commerce for resale by a company engaged solely in the production and gathering of natural gas where the sales were made as an incident to and immediately upon completion of the company's production and gathering of the natural gas and the company was not otherwise subject to the jurisdiction of the Commission. In the Columbian case, as is true here, the sales were made at the end of production and gathering.

In the Billings Gas Company case, 2 F.P.C. 288 (1940), the Commission held that a company engaged in the production and gathering of natural gas and also in the subsequent transportation and sale in interstate commerce for resale for ultimate public consumption was a natural gas company in the statutory sense and that the Commission would not segregate the producing or gathering activities of such a company for the purpose of relieving it from the obligation of making reports to the Commission with respect to those activities.

"We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases."

CONCLUSION

For the foregoing reasons Phillips Petroleum Company prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Pertinent Provisions of Natural Gas Act, 52 Stat. 821, as Amended, 15 U.S.C. 717 et Seq.

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (1946)]

Sec. 2. When used in this act, unless the context otherwise requires—

* * *

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

* * *

Sec. 7. * * *

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission au-

[1] Subsection 7 (c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83.

thorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c) (1946)].[2]

* * *

[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H.R. 6586], 52 Stat. 825, Section 7 (c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience

SEC. 19. • • •

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the

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and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress, that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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